

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:)	In Proceedings
ROSE M. PORTER)	Under Chapter 13
)	
)	No. BK 93-50004
Debtor(s),)	

OPINION

Debtor and her former husband were the owners of a home for approximately 26 years. The home was encumbered by a mortgage on which debtor and her former husband were obligated. At the time of their divorce, debtor and her former husband transferred title to the home to their daughter, Kimberly Harris, subject to the existing mortgage. Contemporaneous with the transfer of title, Kimberly Harris obtained a loan from Madison County Federal Savings and Loan Association¹ secured by a mortgage on the real estate, and paid off the existing mortgage on the property. Because Kimberly Harris was unable to obtain the loan without a cosigner, both the debtor and Kimberly Harris signed the note, rider and mortgage with Madison County Federal Savings and Loan Association. Debtor has continued to live in the home with her daughter since the time of the transfer of title to her daughter.

Sometime in 1992, RTC obtained a judgment of foreclosure against debtor and Kimberly Harris in the Circuit Court for the

¹Subsequently, Madison County Federal Savings and Loan Association was placed in receivership by the Resolution Trust Corporation (hereafter "RTC") which then assigned the note, rider and mortgage to EMC Mortgage Corporation (hereafter "EMC"), the creditor in the instant matter.

Third Judicial Circuit in Madison County, Illinois and a sale of the real estate was scheduled for March 15, 1993. Then, on January 4, 1993, debtor filed a petition for relief under chapter 13 of the Bankruptcy Code, followed by a motion asking the Bankruptcy Court to enforce the codebtor stay of 11 U.S.C. section 1301(a) by curtailing the sale of Kimberly Harris' home. EMC responded with a motion pursuant to 11 U.S.C. section 1301(c) (1) seeking relief from the codebtor stay on the basis that Kimberly Harris, and not the debtor, received the consideration for the claim held by EMC.²

The Court heard argument on both motions on February 8, 1993 and heard supplemental argument during a telephonic hearing on February 10, 1993. During the hearings, the parties stipulated to the facts set forth above. However, debtor maintained that her continued ability to live in her daughter's home constituted consideration to her within the meaning of section 1301(c)(1).

Section 1301(a) of the Bankruptcy Code, 11 U.S.C. § 1301(a), provides a stay of actions by creditors against individuals who cosigned, or secured, consumer debts of the debtor. It provides:

- (a) Except as provided in subsections
- (b) and (c) of this section, after the order for relief under this chapter, a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the

²Debtor's plan of reorganization, which has not yet been confirmed, proposes to cure the mortgage arrearage while making current mortgage payments of \$265.33 through the plan. EMC has objected to confirmation of the plan as underfunded because the current monthly mortgage payments are \$380.71, the arrearage as of February, 1993 is \$15,700.90 and the plan fails to provide for the payment of real estate taxes and insurance on the mortgaged premises.

debtor from any individual that is liable on such debt with the debtor, or that secured such debt, unless
--

(1) such individual became liable on or secured such debt in the ordinary course of such individuals business; or

(2) the case is closed, dismissed, or converted to a case under chapter 7 or 11 of this title.

The codebtor stay of section 1301(a), like the automatic stay of actions against debtors under 11 U.S.C. section 362(a), arises immediately upon the filing of the petition in bankruptcy without affirmative action on the part of the debtor. E.g., In re Harris, 16 B.R. 371, (Bankr. E.D. Tenn. 1982). Its purpose is "to protect a debtor operating under a chapter 13 individual repayment plan case by insulating him from indirect pressures from his creditors exerted through friends or relatives that may have cosigned an obligation of the debtor." H.R. REP. No. 595, 95th Cong., 1st Sess. 426 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6381.³

However, the protection afforded by the codebtor stay is not unlimited. Section 1301(c) allows a creditor to obtain relief from the stay of section 1301(a) under certain circumstances. It states:

(c) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided by subsection (a) of this section with respect to a creditor, to the extent that--

(1) as between the debtor and the

³In the instant case, debtor argues, and EMC does not dispute, that section 1301(a) applies in the first instance to protect Kimberly Harris from actions by EMC.

individual protected under subsection (a) of this section, such individual received the consideration for the claim held by such creditor;

(2) the plan filed by the debtor proposes not to pay such claim; or

(3) such creditor's interest would be irreparably harmed by continuation of such stay.

Paragraphs (1), (2) and (3) of section 1301(c) are in the alternative. Thus, a creditor seeking relief from the codebtor stay need prove only the elements of one paragraph to prevail. E.g., In re Rhodes, 85 B.R. 64, 64 (Bankr. N.D. Ill. 1988); In re Laska, 20 B.R. 675, 676 (Bankr. N.D. Ohio 1982). Here, EMC argues that it is entitled to proceed with the foreclosure sale of Kimberly Harris' house under section 1301(c)(1).

The codebtor envisioned by section 1301(a) is the "signing obligor who did not receive the consideration for the claim held by the creditor, and therefore, who put forward his creditworthiness and assumed liability on the debt solely for the benefit of the debtor now in bankruptcy." In re Bigalk, 75 B.R. 561, 565 (Bankr. D. Minn. 1987) (citing H.R. REP. No. 595, 95th Cong., 1st Sess. 426 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6382). The statute is intended "to afford relief to a debtor by depriving a creditor of the considerable extra-judicial pressure which could be brought to bear [on the debtor]. . . by continuing concerted collection action against an 'innocent' third-party co-obligor not in bankruptcy. . . . Congress did not intend to allow the codebtor stay to be asserted by a co-obligor who in fact received the consideration for the debt." Id. at 565-66. Accordingly,

when the co-obligor is the party who received the consideration for the claim, and the chapter 13 debtor is actually the cosigner on the obligation, the court must grant relief from the codebtor stay to allow the creditor to pursue the party who derived the benefit from the credit transaction. 5 Collier on Bankruptcy ¶ 1301.01[6][a], at 1301-7 (15th ed. 1992).

Here, debtor admits that she cosigned the loan in question as an accommodation to her daughter who could not obtain financing on the home on her own. She also admits that the home belongs entirely to her daughter. However, debtor maintains that her continued ability to reside in her daughter's home represents consideration to her within the meaning of section 1301(c)(1).

Not surprisingly, neither the parties nor the Court have found any cases exactly on point. Nonetheless, despite the lack of authority on this issue, the Court has no doubt that debtor's continued residency in the home has no impact on EMC's right to be relieved of the constraints of the codebtor stay. Clearly, all benefit from the loan transaction went to Kimberly Harris. Debtor's ability to live in the home flows not from any consideration extended by the creditor but rather from the largess of her daughter.

See Order and Judgment entered this date.

_____/s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE

ENTERED: March 3, 1993